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No. 92-1228

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REPUBLIC NATIONAL BANK,
Petitioner,

v.

AMWEST SURETY INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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Respondent proposes four grounds for denying Republic's petition. First, it argues without supporting authority or reason that denial by the court of appeals of Republic's Petition for Rehearing constitutes a sufficient proceeding to satisfy due process requirements. Amwest's position, however, ignores the nature and purposes of proceedings under FRAP 40. Amwest contends next that in any event, no rehearing was required because the Fourth Circuit did not inject new issues into the case. Amwest does not attempt to show that the windfall and warranty of veracity grounds were raised earlier in this case. Instead, it merely argues that the court of appeals' use of the word "windfall" was supposedly no more than a new description of the process of decision typically implicated by an unjust enrichment claim. Even if Amwest's attempted characterization is accurate (which it is not), it ignores the fact that the availability of the windfall rationale depends upon whether the court of

appeals correctly resolved the warranty issues, which issues unquestionably were new to this case. Third, Amwest incorrectly claims that Republic could not be deprived of due process in the absence of a request for a new trial or of proof of new facts going to the merits. Finally, without authority or reasoning of its own and without responding to the authority and commentators cited by Republic, Amwest incorrectly and illogically concludes that the Fourth Circuit's opinion is unlikely to have any effect beyond the immediate parties.

1. Amwest claims that *denial* of a petition for rehearing somehow equates to the type of full re-consideration which would have been provided if rehearing had been granted. This argument should be rejected out of hand given that failure of a petition to achieve necessary votes for rehearing does *not* imply any judgment on the merits and has no jurisprudential significance. *In re Grand Jury Investigation*, 542 F.2d 166, 173 (3d Cir. 1976), *cert. den.*, 429 U.S. 1047 (1977). Because the Fourth Circuit, by denying rehearing, refused to review the merits of Republic's position on issues which were raised for the first time in the court's opinion, Republic has been denied the due process of law to which it is entitled under *Saunders v. Shaw*, 244 U.S. 317 (1917).

2. Amwest's unpersuasive attempt to convince the Court that the decision below did not inject new issues into this case conveniently mischaracterizes the effect of that decision and purposely ignores the primary ground upon which it was based. Indeed, Amwest never denies (and therefore implicitly concedes) that the purported warranty of veracity and the "windfall" concept had never been mentioned prior to the court of appeals' opinion. The primary ground for the Fourth Circuit's decision was its imposition of the requirement of a separate warranty of varacity under § 5-111(1), and the issues raised by this ground unquestionably appeared for the first time in the Fourth Circuit's opinion.

Moreover, those issues cannot be separated from the court of appeals' use of the "windfall" rationale. If the Fourth Circuit erred in requiring a separate warranty of veracity, avoidance of a windfall to Republic could not legally constitute a relevant consideration. As the Fourth Circuit itself recognized, unjust enrichment requires a finding that the enriched party has obtained "the property or proceeds *of another*, without a right to do so. . . ." Pet. App. 10a (emphasis added), *quoting*, *Harper v. McCoy*, 276 S.E.2d 782, 783-84 (S.C. 1981). The court of appeals also recognized that if a beneficiary obtains the proceeds of a letter of credit by submitting a draft when all conditions of the credit have not been satisfied, it violates the § 5-111 warranty and does not become the owner of the wrongly obtained funds. Pet. App. at 12a. In such a case, under § 5-111 the funds go to the issuer.

By concluding that even if there had been a breach of warranty, the funds should go to Amwest in order to avoid a windfall to Republic, the Fourth Circuit reached a result which cannot be supported in law or in equity. Recognition of Republic's right to the funds is the result which is compelled by proper application of § 5-111 and traditional letter of credit law. The Fourth Circuit's reliance upon broad equitable principles in order to circumvent that right was clearly improper. Indeed, use of equitable powers is limited by the rule that

> [e]quitable principles . . . cannot be applied . . . to subvert established rules of law . . . . While maxims of equity may be involved to protect an existing right, they are not available to create a right where none exists.

27 Am.Jur. 2d, *Equity* § 118 at 645 (1966). Thus, if Amwest obtained the disputed funds in violation of its § 5-111 warranties, it had no right to those funds, and equity cannot properly be employed to create such a right.

The windfall rationale raises serious issues, even apart from the warranty questions. A serious concern of

those engaged in commerce and banking is whether the type of case-by-case decision-making which is required by the windfall rationale can or should have any application in letter of credit cases. In addition, the issues raised by the summary judgment motions and this appeal were limited exclusively to whether or not Amwest could meet each of the legal requirements for an unjust enrichment claim. There has never been any need to marshall facts in order to prove, legal issues of ownership aside, which party would be more "deserving" of the disputed funds. As a result, Amwest's conclusion that use of a "windfall" rationale raised no new issues is not supportable, legally or factually.

3. Amwest's reliance on *Helis v. Ward*, 308 U.S. 365 (1939), as authority for denying the writ is clearly misplaced. The Court recognized in *Helis* that the *claimed* due process violation was a sufficient basis for granting the writ. It was nonetheless constrained to affirm the opinion below because the ground for reversal had been waived due to the petitioner's failure to assert it in the petition for rehearing. To suggest that in *Helis* the Court held that no due process violation could occur in the absence of a new trial motion or of proof of new facts is simply silly.[1]

4. Amwest's suggestion that the decision below will have little impact beyond the immediate parties is illogical and conclusory. The Fourth Circuit's implicit recognition that in letter of credit cases, case-by-case decision-making on the basis of broad equitable principles is appropriate constitutes a radical and dangerous departure from traditional law. The commentators quoted in the Petition for Writ of Certiorari testify vigorously to that fact.

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[1] This case was decided on summary judgment, so it is hard to understand how Republic could be expected to have made a new trial motion. Moreover, Republic could not be expected to present proof of facts to the Fourth Circuit which could not have been known to be at issue in this case while discovery was in progress.

CONCLUSION

An appellate court is far more likely to reach a correct and just decision in accordance with the law when those issues which are eligible for consideration are exposed to the rigors of briefing and argument. No court is perfect. And while there may be an occasional case in which, from an abstract academic perspective, a court has managed to reach the correct legal result based upon grounds of its own creation, the mere possibility of a correct result is not sufficient justification for denying a litigant the right to be heard. Indeed, the risk of *incorrect* decisions created by such an unguided process suggests strongly that this Court, as the last court in position to insure justice, should routinely and affirmatively act to address the type of unconstitutional abuse which has occurred in this case. A failure to act can only encourage subordinate courts to employ the type of unfortunate result-oriented approach which has culminated in the dangerous and nearly incomprehensible decision from which appeal is here taken.[2]

The Petition for Writ of Certiorari should be granted, and the decision of the court of appeals relating to unjust enrichment summarily reversed.[3]

Respectfully submitted,

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[2] While the vindication of constitutional rights is the primary justification for intervention by the Court, the fact that the decision below will likely have important precedential consequences also justifies review.

[3] Amwest has not attempted to dispute that in the event the grounds relied upon by the Fourth Circuit were not briefed on appeal, they have been waived, thereby supporting summary reversal.